S.B.Civil Second Appeal No.210/2001
Noor Mohammed
Vs.
Mussamat Jenab & Ors.

DATE OF ORDER : - 6.3.2006

HON'BLE MR. PRAKASH TATIA,J.

Mr. Arvind Samdariya, for the appellant.
Mr. Usman Gani, for the respondent/s

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Heard learned counsel for the parties.

The appellants are aggrieved against the judgment and decree of the trial court dated 28.8.1997 and the judgment and decree of the appellate court dated 1.3.2001. The plaintiff has filed the suit for partition which was dismissed by the two courts below.

It appears from the facts of the case that the plaintiff Allahadin had three sons viz. Noor Mohd. (Plaintiff) and Mohd. Hussain and Ismile (defendants). The plaintiff's case is that the suit property was gifted by Allahadin by gift deed dated 15.12.1965 (Ex.-1) and therefore, the plaintiff became owner of the portion of the house by virtue of said gift deed. However, the gift deed is not registered one and is on a small piece of single paper. The defendants' case is that the suit property was sold by said Allahadin by registered sale deed dated 12.11.1968 (Ex.A/1). The two courts below after considering the documents produced by both the parties, held that the plaintiff failed to

prove the gift whereas the property was sold by registered document to the defendant. According to the learned counsel for the appellant, two courts below committed serious error of law in relying upon the sale deed (Ex.-A/1) produced by the defendant which is dated 12.11.1968. It is submitted that before 12.11.1968 Allahadin already gifted the property to the plaintiff on 15.12.1965, therefore, on 12.11.1968 Allahadin was not owner of the property and could not have sold it. It is also submitted that the courts below misread the statement of the plaintiff. The plaintiff nowhere admitted that deceased Allahadin used to mark the thumb for execution of document whereas Allahadin was literate as stated by the plaintiff and his witnesses. It is also submitted that the gift deed dated 15.12.1965 was acted upon and even the defendant admitted the ownership of the plaintiff in writing by signing the letter Ex.-2.

I considered the submission of the learned counsel for the appellant and perused the record also. It appears from the facts of the case that the plaintiff came with the document of gift, which is not registered and defendant came with the case of sale in their favour by registered sale deed of the year 1968. Admittedly, the defendants were in occupation of the house in dispute before the alleged gift, set up by the plaintiff. It is not the case of the plaintiff that either actual or constructive possession was taken from the defendant at the time of execution of gift deed dated 15.12.1965 or thereafter. The plaintiff's

own witness PW-2 categorically admitted that till Allahadin died, he was in possession of the suit property. Therefore, it appears that the alleged gift deed was never acted upon and the possession never came with the plaintiff till the life time of his father Allahadin or after death of Allahadin.

It will be worthwhile to mention here that the sale deed set up by the defendant Ex.-1 has not been challenged by the plaintiff till suit was filed by the plaintiff. The challenge to the sale deed is only in the rejoinder.

In view of the above facts since the two courts below considered the evidence, oral as well as documentary, and recorded the finding of facts against the plaintiff which have not been vitiated because of any lawful reason.

I do not find force in this appeal, hence, the same is hereby dismissed.

(Prakash Tatia), J.

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